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No. 96-782

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

THE ESTATE OF MAX G. COLE, by its Administratrix Lois Pardue, AND LOIS PARDUE,

Petitioners,

v.

NANCY BUTLER, individually,

Respondent.

REPLY BRIEF OF PETITIONERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

January 22, 1997

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Reasons for Granting the Writ

At this stage of the proceeding, Dr. Butler is not entitled to construe the facts in her own favor. For example, Dr. Butler claims she had no knowledge that plastic bags were available on the BU2 unit. Respondent's Brief at 2. But, the courts below agreed "a jury could reasonably find that she did know the bags were there." (a-24).[1] *See also* (a-4).

The evidence shows Dr. Butler kept Cole on "potential suicide" status for the entire time he was under her care. Pl. Ex. 16-19.[2] Plaintiffs' expert testified that plastic bags presented a substantial risk of serious harm to "potential suicide" patients:

> The danger presented by the plastic bags in the trash can and the laundry hamper on the BU2 unit [was] obvious and significant, and constituted a substantial risk of serious harm, and significant risk of death, to a "***potential suicide***" patient such as Mr. Cole.

Dr. Davis' Affidavit ¶¶ 4, at 3 (A-27) (emphasis added).

Dr. Butler tries to characterize Plaintiffs' claims as a challenge to how she classified Cole. Respondent's Brief

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[1]References to the appendix in the petition are denoted as a-____, and to the appendix in the Plaintiffs-Appellants' Brief, filed in the Seventh Circuit, as A-___.

[2]"Potential suicide" status is reserved for patients who "'exhibit or verbalize suicidal ideations.'" (a-19).

at 4. The question of whether Dr. Butler erred in classifying Cole as "potential suicide" patient is immaterial. Assuming she was absolutely correct in classifying Cole, the expert testimony still shows that she knowingly disregarded a "substantial risk of serious harm, and significant risk of death," by committing Cole to a unit where plastic bags were available to him. *Id.* Plaintiffs' expert evidence shows plastic bags presented a "substantial risk of serious harm, and significant risk of death" to a "'***potential suicide***'" patient. (A-27) (emphasis added).[3]

The Seventh Circuit has squarely held that the prisoners and pretrial detainees may not present evidence

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[3]That plastic bags were available on the unit pursuant to policy does not save the day. Dr. Butler was the medical director of the unit. *Butler's Depo.* at 5. She was also responsible for promulgating and approving the patient care policies, including the "potential suicide" precautions policy, at the unit. *See e.g.* Pl. Ex. 11. Thus, she is responsible for the policies under which she seeks refuge. Further, a state actor has no right to violate a citizen's constitutional right just because the actor is following the command of an employer. *Villanueva v. George*, 659 F.2d 851 (8th Cir. 1981) (defendants may not hide behind the cloak of institutional loyalty). Dr. Butler is as much liable under the fourteenth amendment as a police officer would be under the fourth amendment if the officer had unconstitutionally, albeit pursuant to a municipal policy, executed a search warrant.

contradictory to the self-serving testimony of a prison doctor who denies deliberate indifference:

> We cannot permit the factfinder to *infer* subjective knowledge of a substantial risk that Cole would harm himself based on Dr. Davis's testimony that the risk was "obvious" because this would conflict with Dr. Butler's subjective medical judgment, evidenced by her diagnosis, the appropriateness of which plaintiffs do not challenge.

94 F.3d at 261 (a-10).

The Seventh Circuit does not allow an "after the fact" opinion of a medical expert to be presented to contradict a prison doctor's self-serving denial of deliberate indifference. *Steele v. Choi*, 82 F.3d 176, 178 (7th Cir. 1996) ("after the fact" expert evidence disregarded), *cert. denied*, ___ S. Ct. ___ (1996). *See also Snipes v. Detella*, 95 F.3d 586, 591 (7th Cir. Sep. 9, 1996) (a prison doctor may not be held constitutionally liable for extracting the prisoner's toenail *without* local anesthesia), *cert. pet. pending*, No. 96-7058 (filed Dec. 9, 1996) (same counsel).[4]

Plaintiffs' expert, a Diplomate of the American Board of Psychiatry and Neurology, presented a reasoned

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[4]The decisions of the Seventh Circuit are in conflict with the decision of the Eighth and the Eleventh Circuits. *See* Petition at 9-10.

affidavit showing that the deadly danger of plastic bags is obvious and significant to psychiatrists and mental health workers. *Dr. Davis' Affidavit* ¶¶ 1-3, at 2-3 (A-26 to -27). Even Nurse Easton testified plastic bags are dangerous, especially, to patients on "potential suicide" status. *Easton's Depo.* at 20-21 & 35. *See also* United States Consumer Product Safety Comm'n, *Consumer Product Safety Alert* (Mar. 1990) ("from 1980 to 1987[,] 112 children died when plastic bags covered their faces"); Morgan and Priest, *Suicide and Other Unexpected Deaths among Psychiatric In-patients, The Bristol Confidential Inquiry*, 158 British J. of Psychiatry 368, 371 (1991) (listing asphyxiation with a plastic bag among the popular methods of suicide); Gale, et al., *A Study of Suicide in State Mental Hospitals in New York City*, Psych. Quarterly 201, 207 (Fall 1980) (suffocation).

The courts below should have allowed a jury to consider this evidence and decide whether to infer from it that Dr. Butler knowingly disregarded a substantial risk of serious harm to Cole. *See Farmer v. Brennan*, 511 U.S. ___, ___, 114 S. Ct. 1970, 1981 (1994) ("a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious").

Yet, the Seventh Circuit held a jury may not be allowed to infer that Dr. Butler was subjectively aware of the risk based on the objective evidence that the risk was obvious and significant. This was error-- the precise error for which this Court reversed the Seventh Circuit in *Farmer*. "Whether a [defendant] had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference

from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." 511 U.S. at ___, 114 S. Ct. at 1981 (cautioning against "confusing a mental state with the proof of its existence") (citation omitted). Without allowing such an inference, any defendant can take the stand, disclaim subjective knowledge of the obvious, and avoid liability altogether.

This Court should consolidate this case with *Snipes* and grant certiorari in both cases in order to resolve the conflict among the circuits and to explicitly hold that incarcerated individuals are entitled to present the same type of evidence which is available to all other citizens, to meet the stringent standard of proof set forth in *Farmer*.

Conclusion

For the foregoing reasons, Petitioners Estate of Max G. Cole and Lois Pardue respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

January 22, 1997

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